85-2168

NO.

Supreme Court, U.S.
FILED
AUG 21 1986
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

October Term, 1985

JAMES N. FLEMING,

Petitioner

v.

W. BEDFORD MOORE, III

Respondent

RESPONSE TO MOTION OF THE PHILADELPHIA INQUIRER AND CAPITAL CITIES/ABC, INC. FOR LEAVE TO FILE BRIEF, AS AMICI CURIAE, IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

Thomas E. Albro
SMITH, TAGGART, GIBSON & ALBRO
105-109 East High Street
Post Office Box 1585
Charlottesville, Virginia 22901
Telephone: (804) 977-4455

Counsel for the Respondent

APPELLATE PRINTING SERVICES, INC., HERITAGE BLDG., RICHMOND, VA (804) 643-7789

8 pp

No. 85-2168

IN THE

SUPREME COURT OF THE UNITED STATES
October Term, 1985

JAMES N. FLEMING,

Petitioner

v.

W. BEDFORD MOORE, III,

Respondent

RESPONSE TO MOTION OF THE PHILADELPHIA INQUIRER AND CAPITAL CITIES/ABC, INC. FOR LEAVE TO FILE BRIEF, AS AMICI CURIAE, IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

Respondent, W. Bedford Moore, III, hereby responds to the Motion for Leave to File Brief, as amici curiae, filed by the Philadelphia Inquirer and Capital Cities/ABC, Inc. as follows:

I. Respondent Objects to Points I, II, IV of Amici's Brief Since Those Points Discuss Issues That Are Not Properly Before the Court and Are Issues That Have Been Previously Considered and Disposed of By The Court.

In points I, II, IV the amici attempt to bring to the attention of the Court first amendment issues that are clearly not properly perfected issues for the Court to consider in its review of this petition. Whether petitioner's allegations of racism were opinions or statements of fact was previously briefed by petitioner and his petitions were denied certiorari in Record Nos. 84-382 and 84-1740. While there can be no doubt that the amici share petitioner's interest in reclassifying the defamation--more than ten years after its publication--as a statement of opinion, this issue is simply one that is not properly before the Court.

Points II and IV raised by amici, likewise, are not issues before this Court. Those issues were not raised in the Virginia Supreme Court appeal from which this petition for a writ is taken. Petitioner concedes that all of his federal constitutional issues were presented to both the Circuit Court of Albemarle County and to the Supreme Court of Virginia in an appeal prior to the appeal at issue here. See Fleming v. Moore, sub nom Gazzett v. Harris, 229 Va. 1, 325 S.E.2d 713 (1985). Petitioner also concedes that the Virginia Supreme Court's affirmance of compensatory and punitive liability in Fleming v. Moore, supra constituted a final ruling on the federal constitutional issues involved in the affirmance of that liability, as well as on the federal constitutional issues over which the Supreme Court of

Virginia declined to exercise jurisdiction. Those federal issues were presented to this Court in Record No. 84-1740, which was denied certiorari. See Petition for Writ of Certiorari, Record No. 84-1740, page 4.

To permit those issues to be briefed by the amici would be a waste of the Court's time and resources.

II. Respondent Does Not Object to the Brief of Amici as it Relates to Point III Discussed Therein Since That Point Is Properly Before the Court.

Point III of the amici's brief is the only issue discussed therein that relates to the issue before this Court. Since the size of the state court verdict is a proper issue, respondent has no objection to this segment of the amici's brief being considered.

WHEREFORE, respondent W. Bedford Moore, III respectfully requests that the Motion for Leave to File Brief, as Amici Curiae, by the Philadelphia Inquirer and Capital Cities/ABC, Inc. in support of petitioner's brief for writ of certiorari be denied as it relates to Points I, II, and IV therein. Respondent has no objection to Point III of the amici's brief.

W. BEDFORD MOORE, III

By Counsel

Counsel:

Thomas E. Albro
SMITH, TAGGART, GIBSON & ALBRO
105-109 East High Street
Post Office Box 1585
Charlottesville, Virginia 22901
Telephone: (804) 977-4455

CERTIFICATE OF SERVICE

I hereby certify that on the 18th day of August, 1986 I served three (3) photocopies of the foregoing Response to the following counsel of record in this case:

D. Alan Rudlin
W. Jeffrey Edwards
HUNTON & WILLIAMS
Post Office Box 1535
Richmond, Virginia 23221

J. Benjamin Dick
421 Park Street
Suite 2
Charlottesville, Virginia 22901

S. W. Tucker
Hill, Tucker & Marsh
Post Office Box 27363
Richmond, Virginia 23261

Gerald G. Poindexter
Surry Courthouse Square
Surry, Virginia

Grover G. Hankins
General Counsel NAACP
805 Mount Hope Drive
Baltimore, Maryland 21215

J. Levonne Chambers
Eric Schnapper
NAACP Legal Defense and Educational
Fund, Inc.
16th Floor
New York, New York 10013

Henry R. Kaufman
404 Park Avenue South
New York, New York 10016

Kay Craig